87-804

No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAKE P. BEASON,

Petitioner,

vs.

BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does *Celotex Corp.* v. *Catrett*, U.S. , 91 L.Ed.2d 265, 106 S.Ct. 2548 compel or allow for summary judgment to resolve claims of racial discrimination and infringement of first amendment political speech by a public school board and administration against a black physically disabled teacher brought pursuant to 42 U.S.C. 1981, 1983 and 1985—the civil rights act?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit filed July 27, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on July 27, 1987 and is set forth in the appendix, pages App. 1-3.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner Jake Beason is a physically disabled black man, suffering from paraplegia. Petitioner first commenced employment with the Milwaukee Public Schools at North Division High School in September, 1967. However, Mr. Beason was terminated for allegedly failing to supply certain materials to the Board of School Directors after his appointment in 1967. Mr. Beason was, subsequently, reinstated and has a seniority date of January 23, 1968. Petitioner held various assignments as a high school teacher and junior high school teacher in the Milwaukee Public Schools between September, 1967 and the 1982-83 school year. Petitioner holds a MA degree in black studies/minority studies from Northeastern Illinois University. He was one of the first teachers in the Milwaukee Public Schools to assist in the preparation and teaching of a program of black studies.

Petitioner had, during his tenure with the Milwaukee Public Schools, actively spoken out against and worked to eradicate systematic discrimination against members of the black race—both students and teachers—in the Milwaukee Public Schools. He had publicly criticized the Milwaukee Public Schools' desegregation plan as racist and discriminatory and accused the Milwaukee Public Schools administration of racism in its adoption and use of textbooks used for the U.S. history class at Custer High School in the local media. Petitioner was reassigned from North Division High School in September, 1977 to Custer High School. Petitioner taught social studies at Custer until he was "excessed" from that high school in 1982; allegedly because of an expected drop in enrollment. Petitioner was the only black teacher in the social studies department and

the most experienced teacher in the field of Afro-American history at the school. Although the student enrollment at Custer High School was over 50% black at the time petitioner was excessed, he was replaced by another teacher from North Division High School who had less seniority than he did; albeit there was clear precedent for the principal to retain petitioner at Custer by having him teach Afro-American history and assigning him to a study hall or cafeteria duty. That same year (1982) petitioner substituted for a teacher at Custer who taught only four U.S. history classes and was assigned to cafeteria duty. That teacher had only approximately five years seniority.

Commencing in 1982, the respondents removed petitioner from a permanent placement at Custer High School and designated him as on "excess status" as a substitute teacher on day to day call to fill in for teachers in the system absent due to illness.

In spite of the petitioner's paraplegic condition, the respondents made the assignments of the petitioner on a day to day basis in such a fashion as to assign the petitioner to inconvenient schools which, in many instances, involved facilities inadequate for access to the petitioner because of his physical handicaps. Respondents also reduced the payment of salary to the petitioner by docking his wages for minor tardiness where other teachers, not physically impaired, have not had their wages docked for tardiness.

Petitioner Beason held Certifications designated 725 and 745 by the State Department of Public Instruction. The "excess status" imposed upon the petitioner was made on the basis that he did not have proper certification to teach world geography. However, following the school administration's "excessing" of petitioner from Custer High School, ostensibly for not being certified to teach geography, one Ms. Claudia Roessl, a white woman, was assigned to teach art and geography at Custer. However, Ms. Roessl was not certified to teach geography but was only certified to teach

art. The respondents admit that Ms. Roessl was not certified to teach geography and that the assignment should not have been made. Moreover, Mr. Beason, who was teaching social studies at Custer before he was excessed, had previously taught geography in the Milwaukee Public Schools, albeit he was not certified to teach that subject. However, Ms. Roessl was clearly not certified to teach geography and she was junior in seniority to petitioner Beason.

Petitioner Beason also found copies of all of the articles that he had written criticizing the Milwaukee Public Schools' administration and policies in his personnel file. Petitioner had not requested that such articles be placed in his personnel file.

The respondents also knowingly assigned the petitioner to excess status and to teach in areas out of his expertise in order to compel the petitioner to resign or retire from his employment in the Milwaukee Public School system, although the excess status was contrary to his seniority, particularly when weighed against the respondents' hiring of a less senior teacher to teach a course she was not certified to teach at the same high school that the petitioner was excessed from for his lack of certification to teach the same course that the teacher hired by the school administration was uncertified to teach.

After petitioner brought suit against the Milwaukee Public Schools and after he had filed for a disability retirement, he was offered a regular teaching position in January, 1986 by the respondents. Petitioner declined this late-arriving offer.

The petitioner, Jake Beason, commenced this action in February, 1985 against the respondent Milwaukee Board of School Directors of the City of Milwaukee and others in the United States District Court for the Eastern District of Wisconsin alleging discrimination by the respondents because of the petitioner's race and discrimination against the petitioner because of his exercise of free speech.

Petitioner amended his Complaint on July 1, 1985. The respondents answered petitioner's Amended Complaint on July 18, 1985 and a Stipulation and Order extending discovery was entered and the pre-trial conference and trial dates were cancelled on November 19, 1985. On May 20, 1986 a Scheduling Order setting the Final Pretrial for September 25, 1986 and a jury trial to begin on October 20, 1986 was entered.

On August 7, 1986 respondents moved for summary judgment, dismissal, and alternatively for motion in limine and submitted supporting briefs and affidavits. On September 3, 1986 the petitioner filed his Affidavit in opposition to the respondents' motion for summary judgment.

On November 13, 1986 the Court entered its Decision and Order granting summary judgment and dismissing petitioner's action. Petitioner filed a timely Notice of Appeal from this Order of November 13, 1986.

After submission of briefs and oral argument on April 17, 1987 in the Court of Appeals for the Seventh Circuit the Court affirmed the grant of summary judgment in an unpublished order dated July 27, 1987. App. 1-3.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES SUPREME COURT SHOULD CLARIFY FOR THE LOWER FEDERAL COURTS THAT *CELOTEX CORP.* V. *CATRETT*, U.S. , 91 L.Ed.2d 265, 106 S.Ct. 2548 DOES NOT AUTHORIZE SUMMARY JUDGMENT TO RESOLVE CIVIL RIGHTS AND FIRST AMENDMENT POLITICAL SPEECH CASES.

The Court of Appeals' decision here was based solely upon *Celotex*. *Celotex* is the only case citation made in the opinion. The use of *Celotex* to ratify summary judgment of civil rights litigation is alarming and inimical to the right of

minorities to access to the federal courts to redress claims of discrimination against them by state institutions—in this case the public school board and administration of Milwaukee County, Wisconsin.

Before *Celotex* the application of traditional rules attending motions under Rule 56 would clearly have compelled reversal of the summary judgment granted the defendants by the District Court.

The plaintiff had filed his affidavit in opposition to the motion and it was undisputed that the teaching position which had been usurped from him had been assigned to a white teacher with less seniority. Drawing all permissible inferences from the evidence IN FAVOR of the petitioner as was the law should have resulted in denial of the motion for summary judgment. See, e.g., *National Ind. Inc.* v. *Republic Nat. Life Ins. Co.*; 677 F.2d 1258 (9th Cir. 1982), *Black Panther Party* v. *Smith*; 661 F.2d 1243 (DC Cir. 1981); *Frey* v. *Woodward*, 748 F.2d 173 (3rd Cir. 1984).

In addition, of course, the principles of *Adickes* v. *S.H. Kress Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) and *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) are implicitly reversed by the Court of Appeals' opinion in the case at bar.

The existence of a prima facie case of discrimination on both race and first amendment grounds is evident from the very facts quoted in the opinion of the Court of Appeals:

> ". . . Beason brought an action alleging that the defendants removed him from his full-time teaching position . . . because of his race and because he made public statements critical of defendants' policies. . .
>
> The Milwaukee Public Schools Administration ("MPSA") removed plaintiff, a physically disabled black man, from his permanent teaching position at Custer High School. In his place, the MPSA hired . . . a white female to teach art and geography. Although

> Beason had been teaching geography, neither he nor (the white replacement) is certified to teach it . . .
>
> . . . his personnel file contains copies of all the published articles that he had written that are critical of the MPSA. He asserts that . . . school officials were hostile to his views and retaliated by removing him from his permanent position[1] . . . Beason states that his seniority was changed, but he does not challenge the way it was changed . . . Beason has an adjusted date because he was terminated due to his failure to supply certain information . . ."

Such facts are truly a classic example of a case which demands ultimate resolution of the underlying motives and intent by the finder of fact. This case is clearly not one to be resolved by summary judgment—for any party.

Civil rights claims are particularly inappropriate for resolution by summary judgment. *Randle* v. *City of Chicago*, 527 F.Supp. 1 (DC Ill. 1979); *Ustrack* v. *Fairman*, 781 F.2d 573, cert. den. 107 S.Ct. 95 (7th Cir. 1986); *McPherson* v. *Rankin*, 736 F.2d 175 (1984); *Harden* v. *Adams*, 760 F.2d 1158, reh.den. 767 F.2d 938 (1985); *Equia* v. *Tompkins*, 756 F.2d 1130 (1985); *Ray* v. *Edwards*, 725 F.2d 655 (1984). Also cf. *Warfield* v. *Adams*, 582 F.Supp. 111 (DC Ind. 1984) where there was no evidence submitted that the position was filled by a white person.

The Court of Appeals for the Seventh Circuit has utilized *Celotex* in a fashion to extend it beyond its intended perimeters and has thereby occasioned a miscarriage of justice in a racial discrimination and first amendment infringement case.

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[1] The opinion admittedly argues against the facts and accepts all of the defenses propounded by the respondents. That is the appropriate function of the advocates not the Court of Appeals, it is respectfully submitted; and ultimately the responsibility of the properly instructed jury. The Court of Appeals should have argued the facts most favorably to the petitioner not against him.

CONCLUSION

It is respectfully submitted that the Supreme Court should grant the Petition for Certiorari in order to clarify the application of *Celotex Corp.* v. *Catrett*, U.S. , 91 L.Ed.2d 265, 106 S.Ct. 2548 to civil rights and first amendment infringement litigation.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued April 17, 1987

July 27, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

JAKE P. BEASON,
Plaintiff-Appellant,

No. 86-3049 vs.

BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 85-C-0261

John W. Reynolds, *Judge*

ORDER

Plaintiff, Jake Beason, appeals the district court's grant of summary judgment in favor of defendants, Board of School Directors of the City of Milwaukee. Beason brought an action alleging that defendants removed him from his full-time teaching position at a local high school and assigned him on a random basis as a substitute teacher because of his race and because he made public statements critical of defendants' policies regarding the teaching of black history in the Milwaukee public schools. Plaintiff sought permanent assignment to a particular school and

damages. We affirm the district court's grant of summary judgment for the defendants because the plaintiff has not established any connection between the job action taken and his race or political views.

I.

The Milwaukee Public Schools Administration ("MPSA"), removed plaintiff, a physically disabled black man, from his permanent teaching position at Custer High School. In his place, the MPSA hired Claudia Roessl, a white female to teach art and geography. Although Beason had been teaching geography, neither he nor Roessl is certified to teach it. Defendants admit that they erred in assigning Roessl to Beason's position but they argue that his termination was motivated neither by racial discrimination nor a result of his open criticism of school policy.[1] Instead, the defendants argue that Beason was removed from his position at Custer High School because he lacked certification to teach the needed classes and because he lacked seniority.

Plaintiff argues that his personnel file contained copies of all the published articles that he had written that are critical of the MPSA. He asserts that certain unnamed school officials were hostile to his views and retaliated by removing him from his permanent position. However, he fails to produce any evidence that establishes a connection between his removal and the MPSA keeping copies of his articles on file. He has produced no evidence to prove that the people who made the final decision to remove him had seen these articles or acted on the basis of them. Beason states that his

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[1] Although Roessl was junior in seniority to Beason, she was certified to teach art. Beason was not certified to teach geography or art. Had a teacher become available to teach both art and geography, the MPSA would have assigned that teacher to Custer and reassigned Roessl. (Thomas Aff. § 25, Exh. 13, Supp. A. pp. 257-59; 293-94).

seniority was changed, but he does not challenge the way it was changed.[2]

Under Rule 56(c) of the Federal Rules of Civil Procedure summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." It is appropriate here, since Beason failed to present any evidence to show that he could meet his burden of proving that the defendants terminated him from his permanent position because of his race or his publications critical of the MPSA. Because Beason has not alleged specific facts and circumstances which demonstrate that a clear issue exists for trial, the grant of summary judgment for the defendant was proper. *Celotex Corp. v. Catrett*, ____ U.S. ____, (1986). For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[2] Beason began his employment with MPSA at North Division High School in September 1967. His seniority date, however, is January 23, 1968. Beason has an adjusted date because he was terminated due to his failure to supply certain information to the Board of School Directors after his appointment in 1967.

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 27, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

JAKE P. BEASON,
Plaintiff-Appellant,

No. 86-3049 vs.

BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 85-C-261

John W. Reynolds, *Judge*

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAKE BEASON, *Plaintiff,* v. MILWAUKEE BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, et al., *Defendants.*	Civil Action No. 85-C-261

DECISION AND ORDER

Plaintiff Jake Beason is a physically disabled black man who brings this action alleging that the defendants removed him from his full-time teaching job at a local high school and assigned him on a random basis as a substitute teacher because of his race and because he made public statements critical of the defendants' policies regarding the teaching of black history in Milwaukee public schools. Jurisdiction arises from 28 U.S.C. § 1331 because the plaintiff alleges that defendants' action resulted in a violation of his civil rights. Plaintiff seeks permanent assignment to a particular school, compensatory and punitive damages, and attorney's fees. The defendants have moved for summary judgment or, alternatively, for an order that certain evidence be excluded at trial.

Defendants' motion for summary judgment will be granted because there are no disputed issues of material fact, and the defendant is entitled to judgment as a matter of law. The facts are taken from the submissions of the parties. The defendants have established through uncontroverted affidavits and documents that the personnel decisions made regarding Mr. Beason resulted from established

policies and procedures, and that neither race nor constitutionally-protected speech played a role in those determinations. The plaintiff has responded with his own affidavit, stating the information upon which he bases his conclusion that he has been the victim of discrimination.

Plaintiff began teaching in the Milwaukee Public Schools in 1967 and was assigned to Custer High School in the fall of 1977. He was "excessed," or removed, from his position at Custer for the 1982-83 school year, but he continued to receive the same salary and benefits and possessed the same seniority. His teaching assignment was changed to different schools on a day-to-day basis.

Teachers in Milwaukee public schools are assigned to the various schools according to the staffing requirements at those institutions. The positions are filled by teachers who are properly certified to teach the required subjects and on the basis of seniority. The assignment process is governed by the collective bargaining agreement the school system and the teachers' union have worked out and by various state and federal requirements, including federal requirements that certain percentages of Milwaukee public school teachers be black. The collective bargaining agreement also contains a grievance and arbitration mechanism, but no union action was taken with regard to plaintiff's claims.

In support of their motion for summary judgment, the defendants have submitted a brief, voluminous affidavits, deposition transcripts, and documents which establish conclusively that the plaintiff was removed from his position at Custer High School pursuant to the normal policies and procedures of the defendants. In response, the plaintiff has submitted an affidavit in which he states his personal belief that he was excessed due to his race and his criticism of the defendant school system. The plaintiff has attached various articles he has written over the years which are critical of the black studies program in the Milwaukee schools. He

does not challenge the truthfulness or accuracy of the affiants or documents the defendants have presented regarding his situation.

Rather, ther plaintiff relies on the fact that some of the articles he has written over the years were in his personnel file, and his assertion that certain unnamed school officials were hostile to his views. While he states his feeling that he was the most experienced teacher in the field of Afro-American History at Custer, he does not challenge defendants' determination that he was appropriately excessed from his position because of his lack of certification to teach the needed classes and of his lack of seniority. He asserts that an exception was made for some unnamed teacher in 1982. Finally, he states that he was excessed from North Division High School in 1977 because his seniority date was changed after he started teaching. These circumstances lead the plaintiff to the conclusion that he has been punished for his race and his political views.

In light of the evidence the plaintiff has produced, the conclusion is not reasonable. Plaintiff has failed to create a material issue of fact with his affidavit. To recover in this case, he would need to establish some connection between the job action taken and his race or political views. Yet the defendants have explained, and the plaintiff has not disputed their explanation, that the plaintiff was excessed according to well-established criteria and not on the basis of his race or political views. The plaintiff does not challenge the criteria or claim that he had the necessary seniority or certification to retain his position at Custer High School.

The plaintiff has not provided even a shred of evidence that his race or political views played a role in his dismissal. Rather, he points to articles he has written which were critical of the school system, but he does not claim that the people who made the final decision were aware of his views or of the articles he wrote. In fact, some of the articles were written after he was excessed. He states his belief that he was the most experienced teacher at Custer, but he does not

claim that he was, as is required, the most senior teacher certified to teach the needed classes. He claims, but does not specifically support the claim, that there was precedent for him to remain at Custer, but he does not explain what that precedent was or how his race or political views prevented him from enjoying similar treatment. The plaintiff states that his seniority date was changed, but he does not challenge the way it was changed. Finally, he states that he was excessed in 1977, but he does not state how that incident, now eight years old, relates to this lawsuit and his race and political views.

In support of their motion for summary judgment, the defendants have established by uncontroverted affidavits that the plaintiff was removed from his full-time teaching position at Custer High School pursuant to established procedures and that the plaintiff's race and political views did not affect the determination to remove him. The plaintiff's response to this motion does not challenge the defendant's explanation of the reasons for his removal. Neither does the plaintiff provide the court with any factual support for his claims that his race and/or political views affected the defendants' decision to terminate him.

Defendants' motion for summary judgment will be granted because the plaintiff has failed to present any evidence to show that he could meet his burden of proving causation if this case proceeded to trial. *Celotex Corporation v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

IT IS THEREFORE ORDERED that the defendant's motion for summary judgment is granted and that this action is dismissed.

Dated at Milwaukee, Wisconsin, this 13th day of November, 1986.

BY THE COURT:

JOHN W. REYNOLDS
Senior Judge